FILED BY CLERK
FEB 26 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. MIGUEL ANGEL ZEBADUA, Appellant.	2 CA-CR 2008-0074 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20070385

Honorable Richard Fields, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Amy M. Thorson
Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By David J. Euchner
Tucson
Attorneys for Appellant

H O W A R D, Presiding Judge.

¶1 After a jury trial, appellant Miguel Zebadua was convicted of one count of sexual assault and one count of attempted sexual assault. On appeal, Zebadua argues the trial court erred in granting the state's motion to preclude two defense witnesses and in admitting hearsay testimony offered to bolster the victim's credibility. Zebadua also claims fundamental error occurred when character evidence was improperly admitted under Rule 404(c), Ariz. R. Evid., and when a detective gave opinion testimony regarding Zebadua's credibility and guilt. Because the trial court did not err or abuse its discretion, we affirm.

Facts

¶2 "We view the facts in the light most favorable to sustaining the convictions." *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). The victim, Tammy, and her husband, Michael, were out celebrating Tammy's birthday with friends and relatives. A party was held at a bar where Zebadua, whom Michael supervised at work, was present as an invited guest. Eventually, Tammy and Michael invited some of the partygoers, including Zebadua, to return to their home. Tammy went to her bedroom and fell asleep. Michael and some guests spent time in the garage, drinking and socializing. Zebadua, who was also in the garage, asked to use the restroom, and Michael showed him where in the house to find it. Later, Zebadua again went into the house and entered Tammy's bedroom, which was very dark. Tammy woke up and realized someone was performing oral sex on her. She thought it was Michael. Zebadua then attempted sexual intercourse but stopped after Tammy started questioning what he was doing and what was wrong with him. When he opened the door to leave, Tammy could see that it was Zebadua. Tammy found Michael and told him what had

happened. He became angry, retrieved a gun from inside the house, and attempted to confront Zebadua, but Zebadua had already left in a car with another guest. Tammy went to the hospital, and hospital staff reported the assault to law enforcement authorities. Zebadua was eventually arrested and charged. At trial, he asserted that Tammy had invited him into the bedroom and had consented to the sexual acts.

Precluded Witnesses

¶3 Zebadua first argues the trial court erred when it granted the state's motion to preclude two witnesses, Marcos Z. and Loren K., from testifying for the defense. We review a court's decision to exclude evidence for an abuse of discretion. *State v. Davis*, 205 Ariz. 174, ¶ 23, 68 P.3d 127, 131 (App. 2002).

¶4 During a pretrial hearing on the motion, Zebadua explained that Loren would testify that she and her boyfriend Marcos, who is Zebadua's cousin, were at the bar where the party was held. Loren observed Tammy staring and perhaps smiling at Marcos in a group across the bar in a manner that Loren thought was flirtatious. Zebadua asserted this evidence would support his defense of consent and rebut the claim that Tammy was faithful to her husband. Marcos would testify that on the morning after the assault, he had spoken to Michael by telephone and that Michael had threatened to kill Zebadua and his family. Zebadua wanted to offer this testimony to show that Michael had a bad temper, which gave Tammy a motive to lie about having been assaulted.

¶5 At the end of the hearing, the court deferred its ruling on whether to preclude Marcos's testimony about the alleged death threats. The court noted it wanted to see "the

way the evidence develop[ed]" at trial and would give Zebadua "an opportunity . . . to convince [the court] that [Marcos's testimony was] indeed something the jury ha[d] a right to hear." At trial, Zebadua never called Marcos to testify or asked the court for a ruling on this portion of the motion to preclude. *See State v. Lujan*, 136 Ariz. 326, 328, 666 P.2d 71, 73 (1983) (any error waived if appellant fails to bring pending motions to trial court's attention and obtain record of rulings). Because the court never ruled that Zebadua was precluded from presenting evidence of the death threats, there is no ruling for us to review, and any error is waived.

¶6 As to the proffered testimony about Tammy's purportedly flirtatious behavior, the trial court precluded it after finding the evidence was barred by the "rape shield law," A.R.S. § 13-1421. The court also questioned the witness's "subjective" characterization of Tammy's behavior as "flirtations." Under § 13-1421, "[e]vidence of specific instances of the victim's prior sexual conduct may be admitted only if a judge finds the evidence is relevant and is material to a fact in issue in the case." The probative value must not be outweighed by prejudice, and the evidence must fall into one of five enumerated categories. *Id.* Evidence is "[r]elevant" if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ariz. R. Evid. 401. Evidence that is not relevant is not admissible. Ariz. R. Evid. 402.

¶7 Zebadua argues the evidence that Tammy was "flirting" with Marcos was sexual conduct evidence relevant to support an inference that she had consented to have sex

with Zebadua, and was admissible under § 13-1421(A)(3) and (4) to show she had a motive to fabricate her accusation against Zebadua and to rebut a claim by the state that she was faithful to her husband. Zebadua, however, has not explained how staring and smiling at someone in a crowd is "sexual conduct." *Cf.* A.R.S. § 13-1405(A) ("A person commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person who is under eighteen years of age.").

¶8 Even if the evidence could properly be characterized as evidence of "sexual conduct," we do not see its probative value with respect to whether Tammy consented to have sex with Zebadua later that night. Nor do we see how the evidence could be relevant to show Tammy had a motive to fabricate her accusation against Zebadua. Finally, the evidence of Tammy's alleged behavior in the bar was not evidence of an extramarital affair and would not rebut an assertion that she was faithful to her husband. The evidence was simply too insubstantial and immaterial with respect to any of the above issues to warrant admission.

¶9 Whether the trial court's ruling is analyzed under the rape shield law or simply under the rules of evidence, the court could have found that the evidence was not relevant under Rule 401 and thus not admissible under Rule 402. The court did not abuse its discretion in excluding it. *State v. Rojas*, 177 Ariz. 454, 460, 868 P.2d 1037, 1043 (App. 1993) (trial court's decision affirmed if correct for any reason). In light of this conclusion, we need not address Zebadua's arguments regarding the applicability or constitutionality of § 13-1421.

Character Evidence

¶10 Zebadua next argues that character evidence was improperly admitted in violation of Rule 404(c), Ariz. R. Evid., when a witness, Tina A., testified that Zebadua had groped her buttocks on the night in question before the assault on Tammy. Because Zebadua did not object to Tina's testimony at trial, we review for fundamental error. *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Fundamental error is rare and involves "'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *Id.*, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). The defendant has the burden to prove both that fundamental error occurred and that it caused prejudice. *Id.* ¶ 20.

¶11 Rule 404(c) provides that, in sexual misconduct cases, "evidence of other crimes, wrongs, or acts may be admitted by the court if relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged." The rule sets forth various procedural requirements governing disclosure by the state, findings by the court, and instruction to the jury regarding the proper use of the evidence. *Id.* The parties do not dispute that these procedural requirements were not met.

¶12 The state did disclose Tina as a witness and, according to the joint pretrial statement, a witness interview with her was scheduled, thus giving Zebadua a chance to

discover the substance of her anticipated testimony.[1] At trial, Tina testified that, when she was climbing into a truck to leave the party, she felt someone's hands on her "thighs and . . . bottom." She turned, saw that it was Zebadua, and told him to "back the f-up." She testified that Zebadua reacted by laughing. Zebadua did not object but did avail himself of the opportunity to cross-examine Tina.

¶13 Zebadua argues that, if the state had timely disclosed its intent to offer evidence under Rule 404(c), the trial court would have held a hearing to determine its admissibility and subsequently "would have been obligated to preclude" the evidence. Assuming, without deciding, that the court would have so ruled and thus erred by admitting the evidence, this is not one of those rare errors that can be construed as going to the foundation of Zebadua's case or as having taken from him a right essential to his defense. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. It involved a minor, tangential, and much less serious allegation.

¶14 Even if we were to consider the admission of this testimony to be fundamental error, Zebadua would still have to demonstrate prejudice. *Id.* ¶ 20. He would have to "show that a reasonable jury, absent any error in admitting the [evidence], could have reached a different result." *State v. Salazar*, 216 Ariz. 316, ¶ 12, 166 P.3d 107, 110 (App. 2007); *see also Henderson*, 210 Ariz. 561, ¶ 27, 115 P.3d at 609. Zebadua argues that the evidence against him for the charged offenses was "underwhelming" and that allowing the evidence that he had inappropriately groped Tina "likely . . . tipped the balance . . . in favor of a

[1]Some of Zebadua's questions on cross-examination suggest his counsel did in fact interview Tina before trial.

conviction." But we cannot agree with Zebadua's characterization of the state's case against him, and we do not consider the balance of evidence to have been so close that Tina's testimony on this minor, collateral event made the difference between conviction and acquittal. Accordingly, Zebadua has failed to show prejudice.

Hearsay Testimony

¶15 Zebadua next argues the court erred in permitting the state, over his objection, to elicit certain testimony from an investigating deputy. We review for an abuse of discretion. *Davis*, 205 Ariz. 174, ¶ 23, 68 P.3d at 131.

¶16 At trial, Deputy Thomas Peine testified that he had responded when hospital staff called to report the assault. Tammy had arrived at the hospital approximately six hours after the assault occurred. Peine met with Tammy, and she described the incident to him. When Peine began recounting in court what Tammy had told him, Zebadua objected on the basis of hearsay. The state argued the excited utterance exception to the hearsay rule applied. The court agreed but cautioned that it did not want a "total repetition of everything that was said." After further argument by counsel, the court stated Zebadua's position had some "validity" and then noted that the present sense exception would also apply.[2] The court permitted the state to elicit the testimony. In describing his interview with Tammy, Peine

[2]Zebadua argues on appeal that the trial court "rejected" the applicability of the excited utterance exception. But the court's discussion cannot be characterized in such unequivocal terms. The court acknowledged some merit to Zebadua's argument but at no point did the court say the excited utterance exception did not apply. Because we conclude the statements were admissible as excited utterances, we do not address whether the exception for present sense impression would also apply.

observed that "[i]nitially [Tammy] was . . . collected but visibly shaken. Over the course of the interview, . . . we intermittently stopped because she had to cry." Peine stated that recounting the details of the assault itself was when "she was the most shaken."

¶17 Hearsay is an out-of-court statement that is being offered in court for its truth, and hearsay is generally inadmissible. Ariz. R. Evid. 801(c), 802; *State v. Valencia*, 186 Ariz. 493, 497, 924 P.2d 497, 501 (App. 1996). A hearsay statement may be admissible, however, if it falls into one of the exceptions enumerated in Rule 803, Ariz. R. Evid. The excited utterance exception applies to a "statement relating to a startling event or condition made while the declarant was under the stress of the excitement caused by the event or condition." Rule 803(2), Ariz. R. Evid.

¶18 The length of time that the stress may last depends on the circumstances, and "there have been no fixed time limits set to determine whether a statement will qualify as an excited utterance." *State v. Rivera*, 139 Ariz. 409, 411, 678 P.2d 1373, 1375 (1984). Our supreme court has observed that "[i]ncidents involving rape or other sexual offenses have long been viewed as presenting unique circumstances when the spontaneous utterance exception is sought to be applied. . . . Generally, a less demanding time aspect is required." *Id.* at 412, 678 P.2d at 1376 (citations omitted). "Testimony that a declarant still appeared nervous or distraught and that there was a reasonable basis for continuing emotional upset can be sufficient proof of spontaneity even where the interval between the startling event and the statement is long enough to permit reflective thought." *State v. Anaya*, 165 Ariz. 535,

540, 799 P.2d 876, 881 (App. 1990); *see also State v. Johnson*, 183 Ariz. 623, 634, 905 P.2d 1002, 1013 (App. 1995), *aff'd*, 186 Ariz. 329, 922 P.2d 294 (1996).

¶19 In *State v. Starcevich*, 139 Ariz. 378, 387-88, 678 P.2d 959, 968-69 (App. 1983), this court found no abuse of discretion in admitting a rape victim's statement made eight hours after the sexual assault. Zebadua attempts to distinguish *Starcevich* by pointing out the factual differences from the assault in this case. While the assault in *Starcevich* was different, involving both violence and kidnapping, *id.*, the court did not indicate it was restricting the applicability of the excited utterance exception to only cases sharing those factual characteristics. Rather, the court observed that if, after considering all the circumstances, a statement appears to have been "'made in a state of shock or [the] demeanor and actions [of the victim] ha[ve] been altered,'" the statement will be admissible "'even though not made immediately after the event.'" *Id.*, *quoting State v. Barnes*, 124 Ariz. 586, 589-90, 606 P.2d 802, 805-06 (1980).

¶20 Here, Tammy was the victim of a sexual assault in her own home and at the hands of an invited guest. She testified that, after the assault occurred, she "[c]ouldn't believe what had happened." Although at least six hours had elapsed when she made her statements to Peine, he testified that Tammy appeared "visibly shaken" and was crying while making her statements. Considering the totality of the circumstances here, sufficient proof of spontaneity existed to allow the admission of Tammy's statements as excited utterances. *Cf. State v. Perry*, 116 Ariz. 40, 48, 567 P.2d 786, 794 (App. 1977) (no error in admitting statements rape victim made to deputy at hospital when "clear that the emotional condition

which existed when [the victim] first told [a relative] that she had been raped was still operating when she talked to [the] [d]eputy"). The trial court did not abuse its discretion in permitting the state to elicit Peine's testimony about Tammy's statements.

Opinion Testimony

¶21 Zebadua last argues that the trial court erred in permitting a detective, Mark Martinez, to give "improper opinion testimony as to [Zebadua's] credibility and his guilt." Zebadua did not object at trial, and we therefore review only for fundamental error. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. "Determining veracity and credibility lies within the province of the jury, and opinions about witness credibility are 'nothing more than advice to jurors on how to decide the case.'" *State v. Boggs*, 218 Ariz. 325, ¶ 39, 185 P.3d 111, 121 (2008), *quoting State v. Moran*, 151 Ariz. 378, 383, 728 P.2d 248, 253 (1986). *But see State v. Morales*, 198 Ariz. 372, ¶ 13, 10 P.3d 630, 633 (App. 2000) (questioning one witness about whether another witness is lying "may be appropriate when the only possible explanation for the inconsistent testimony is deceit or lying").

¶22 On direct examination, Martinez explained that he had interviewed the victim and other witnesses as well as Zebadua. When recounting his interview with Zebadua, Martinez stated Zebadua had initially denied that any kind of sexual encounter with Tammy had occurred. But after the interviewing detectives suggested they had obtained DNA evidence that corroborated Tammy's story, Zebadua admitted having had sexual contact and gave various inconsistent descriptions of what had occurred. A tape of the interview was

played for the jury and admitted as an exhibit. The state then asked Martinez what had been the basis for his decision to arrest Zebadua. Martinez responded:

> I took into account everything that I had learned during the investigation. The biggest thing for me was Mr. Zebadua himself. He is the one person that I can say definitively out of this entire investigation that was untruthful with me. And, looking at his entire statement, we spent 30 minutes of him denying doing anything. And then the next 30 minutes I believe or approximately 30 minutes, we spend with defending why it happened, and, the fact that it did happen. And there is even some changes in that.
>
> So, I had no reason to trust what he was saying, other than obviously sexual contact had occurred and he was placed under arrest.

Zebadua argues this testimony constitutes an improper statement of the detective's opinion about whether Zebadua was telling the truth and whether he was guilty.

¶23 Even assuming that Martinez's testimony was improper and its admission constituted error, we do not agree with Zebadua's contention that the error took from him the "fundamental right to have a jury determine guilt or innocence." Martinez's statement that he believed Zebadua was lying was completely consistent with the evidence that Zebadua actually had told various inconsistent versions of what had happened. Although it may have been inappropriate for Martinez to make a conclusory statement about these inconsistencies, *see Boggs*, 218 Ariz. 325, ¶ 39, 185 P.3d at 121, the improper comment was not of such magnitude that it deprived Zebadua of a fair trial. *Cf. Morales*, 198 Ariz. 372, ¶ 15, 10 P.3d at 634 ("'Were they lying' questions alone will rarely amount to fundamental error.").

¶24 Morever, even if the detective's testimony could be characterized as causing fundamental error, Zebadua has not shown prejudice. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607 (defendant must show both fundamental error and prejudice). Again, the jury was already aware that Zebadua had told inconsistent stories. *Cf. Boggs*, 218 Ariz. 325, ¶ 42, 185 P.3d at 121. As we did with respect to a similar argument above, we reject Zebadua's assertion that the evidence in this case "could have led the jury to acquit as easily as it voted to convict," and find no merit to the suggestion that this testimony is what made the difference.

Conclusion

¶25 In light of the foregoing, we conclude the trial court did not err, fundamentally or otherwise. Accordingly, we affirm Zebadua's convictions and sentences.

_____
JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

_____
JOHN PELANDER, Chief Judge

_____
PHILIP G. ESPINOSA, Judge